No. 72-734

# In the Supreme Court of the United States

OCTOBER TERM, 1972



UNITED STATES OF AMERICA, PETITIONER

*v.*

JOHN P. CALANDRA

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 11-24) is not yet reported. The opinion of the district court (App. D, *infra*, pp. 27-45) is reported at 332 F. Supp. 737.

### JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 25) was entered on July 27, 1972. A petition for rehearing was denied on September 19, 1972 (App. C, *infra*, p. 26). On October 11, 1972, Mr. Justice Stewart extended the time for filing a petition for a writ of

certiorari to November 18, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a grand jury witness (for whom the government sought transactional immunity under 18 U.S.C. 2514) is entitled to invoke the exclusionary rule formulated under the Fourth Amendment by moving to suppress evidence intended for use in questioning him before the grand jury, on the ground that the evidence was the product of an illegal search and seizure.

## STATEMENT

On December 11, 1970, federal agents obtained a warrant for the search of respondent's place of business, the Royal Machine and Tool Company (A. 4a).[1] The warrant was issued in connection with an investigation of suspected illegal gambling activities, and the object of the search was the discovery of bookmaking records and wagering paraphernalia.[2] The search was con-

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[1] "A." refers to the joint appendix filed in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

[2] Allegations for the search warrant had been submitted as part of a master affidavit covering several persons and places believed to have been involved in the suspected bookmaking operations of Joseph Lanese (A. 11a-36a). The information contained in the affidavit had been obtained from six informants, agents' observations, and court-approved electronic surveillance. The principal information concerning respondent was supplied by an informant who had been assisting the F.B.I. in connection with gambling cases for approximately seven years. This informant advised the F.B.I. that respondent was using his business office for a bookmaking operation. In addition, the wiretap evidence revealed several conversations between respondent and Lanese concerning gambling and the placing of bets, and the observations by agents had provided further indications of their association.

ducted on December 15, 1970 (A. 5a-6a). Although no significant gambling paraphernalia were found, papers believed to be loansharking records were discovered and seized.[3]

In March 1971, a special grand jury was convened in the Northern District of Ohio. Respondent was summoned as a witness, and he appeared before the grand jury on August 17, 1971. At that time, invoking his privilege against self-incrimination, respondent refused to answer any questions. The government then requested the district court to grant respondent transactional immunity pursuant to 18 U.S.C. 2514 (A. 37a-43a). Respondent in turn filed a "Request for Postponement of Hearing on Application for Immunity Order" (A. 44a-46a) in order that he might move to suppress the seized evidence, which the government intended to use as a basis for its questioning.

After a hearing, the district court held that respondent was entitled "to litigate the question of whether the evidence which constitutes the basis of questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure" (App. D, *infra*, at p. 37). The court then found that the search warrant had been issued without probable cause and that the scope of the search authorized was overly broad. On the basis of this finding, the court ordered the evidence to be suppressed and returned to respondent and further ordered that respondent need not answer any

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[3] The papers contained accounts of periodic loan repayments being made to respondent by a person known to be a victim of extortionate credit transactions (A. 127a).

grand jury questions based upon the suppressed evidence. The court of appeals affirmed, holding that the district judge properly entertained the suppression motion, that probable cause for the warrant was lacking, and the search exceeded the scope of the warrant, and that the exclusionary rule operated to bar questioning by the grand jury based on the seized material.

### REASONS FOR GRANTING THE WRIT

The decision below improperly sanctions interference with the grand jury process by permitting a witness to interrupt and delay grand jury proceedings for the purpose of obtaining a hearing and ruling on a motion to suppress. This holding is in conflict with decisions of other courts of appeals and appears inconsistent with the views expressed by a majority of this Court in *Gelbard* v. *United States,* 408 U.S. 41. Furthermore, the court below unjustifiably enlarged the scope of the Fourth Amendment exclusionary rule by allowing the suppression of evidence upon the motion of a person who has been offered immunity from its use.

1. The decision below sanctions an unwarranted interference with the grand jury process. As this Court recently noted, the grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety * * *." *Branzburg* v. *Hayes,* 408 U.S. 665, 688 (quoting from *Blair* v. *United States,* 250 U.S. 273, 282). Because "society's interest is best served by a thorough and extensive investigation" (*Wood* v. *Georgia,* 370 U.S. 375, 392), including the following up of "tips, rumors, evidence proffered by

the prosecutor, or the personal knowledge of the grand jurors" (*Branzburg* v. *Hayes, supra,* at 701), grand jury witnesses traditionally have not been permitted to challenge the evidence that led the grand jury to call them. See *Costello* v. *United States,* 350 U.S. 359; *Blair* v. *United States, supra; Holt* v. *United States,* 218 U.S. 245. Cf. *Branzburg* v. *Hayes, supra; United States* v. *Ryan,* 402 U.S. 530; *Cobbledick* v. *United States,* 309 U.S. 323; *Hale* v. *Henkel,* 201 U.S. 43.

Other courts of appeals, when confronted with the claim that evidence offered before a grand jury should have been suppressed on Fourth Amendment grounds, have recognized that collateral litigation of such claims would substantially interfere with the grand jury's function of promptly investigating criminal activities. Those courts, in conflict with the court below, have refused to apply the Fourth Amendment exclusionary rule to grand jury proceedings or to permit collateral inquiries based on the exclusionary rule. See *West* v. *United States,* 359 F. 2d 50 (C.A. 8), certiorari denied, 385 U.S. 867; *United States ex rel. Rosado* v. *Flood,* 394 F. 2d 139 (C.A. 2), certiorari denied, 393 U.S. 855; *Carter* v. *United States,* 417 F. 2d 384 (C.A. 9), certiorari denied, 399 U.S. 935.

The decision of the court below also appears inconsistent with the views expressed by a majority of this Court in *Gelbard* v. *United States, supra.* In *Gelbard,* this Court held that a grand jury witness has a statutory defense to a contempt citation for refusing to answer questions, if the questions are based upon illegal electronic surveillance. As Mr. Justice White noted in his concurring opinion, however, this result, which the

four dissenting Justices viewed as unwarranted on either statutory or constitutional grounds, "unquestionably works a change in the law with respect to the rights of grand jury witnesses, but it is a change rooted in a complex statute * * *." *Gelbard* v. *United States, supra,* 408 U.S., at 70. Respondent here raises no such statutory claim, and the challenge to the search did not raise an electronic surveillance issue. Moreover, the Court in *Gelbard* did not indicate that the statutory claim which had been asserted there as a defense against a contempt citation could have been raised collaterally during the pendency of the grand jury proceeding to test the sufficiency of a judicial warrant. The Court's opinion explicitly left that question open, even as a matter of statutory construction. See 408 U.S., at 61, n. 22. And Mr. Justice White expressly observed (*id.,* at 70):

> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. * * *

The decision below treats the Fourth Amendment itself as authorizing "a full-blown suppression hearing" and thereby improperly permits "protracted interruption of grand jury proceedings."[4]

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[4] Rule 41(e), Fed. R. Crim. P., also relied on by the court below, merely "conforms to the general standard and is no broader than

2. Although we believe no grand jury witness has a right to invoke the Fourth Amendment exclusionary rule as a basis for avoiding grand jury questioning, the decision below is erroneous on an additional ground. By its ruling, the court of appeals has unjustifiably expanded the scope of the exclusionary rule by allowing the suppression of evidence upon the motion of a person who has been offered immunity from its adverse use.[5] The exclusionary rule has never been so broadly construed by this Court to provide that illegally seized evidence is "inadmissible against anyone for any purpose." *Alderman* v. *United States*, 394 U.S. 165, 175. As this Court observed in *Alderman*, where the claim was made that if any evidence used to convict any of the defendants was illegally seized, then reversal of all their convictions was required (*id.*, at 174):

> There is no necessity to exclude evidence against one defendant in order to protect the rights of another. *No rights of the victim of an illegal search are at stake when the evidence is offered against some other party.* The victim can and very probably will object for himself *when and if* it becomes important for him to do so. [Emphasis supplied.]

Thus, as this Court stated in *Goldstein* v. *United States*, 316 U.S. 114, 120, the rule, more precisely, is

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the constitutional rule." *Alderman* v. *United States*, 394 U. S. 165, 173, n. 6. See, also, *Jones* v. *United States*, 362 U. S. 257, 261. It is clear, therefore, that Rule 41 does not constitute a statutory expansion of the applicability of the exclusionary rule this Court has formulated under the Fourth Amendment.

[5] In making this argument we do not concede the unlawfulness of the search. In our view, there was ample probable cause for the issuance of the search warrant, and the warrant issued was not unduly broad.

that "evidence obtained [illegally] cannot be used in a prosecution against the victim of the unlawful search and seizure * * *." Therefore, in order to invoke the exclusionary rule one must be the person against whom the resulting evidence is sought to be admitted. The court below failed to observe the latter limitation.[6]

Respondent, who had already invoked his privilege against self-incrimination and for whom the government has sought a grant of transactional immunity, was not seeking to prevent the use of the seized evidence against himself. He sought only to prevent its use against others who were not themselves privileged to bar its use. The court below recognized that suppression of the evidence in these circumstances constituted an extension of the basic exclusionary rule, but it reasoned that the deterrent purposes of the rule were best served by such an extension. However, this Court's holding in *Alderman*, denying a witness the right to seek suppression of evidence against others, should have special force in the context of grand jury proceedings, where "the longstanding principle that 'the public * * * has a right to every man's evidence' * * * is particularly applicable * * *." *Branzburg* v. *Hayes*, *supra*, at 688. Accordingly, the court below erred in

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[6] While Rule 41 codifies a procedure by which the victim of an allegedly unlawful search and seizure can reclaim his property, even independently of a pending criminal charge against him, suppression of the use of that evidence (enforcing the exclusionary rule) is properly confined to a criminal prosecution against the movant, and should not apply also to grand jury questioning of him. It is our view that a motion under Rule 41 is legally irrelevant to a grand jury's power to question the person filing the motion.

upholding the suppression, upon respondent's motion, of evidence which would have been used only against others.

### CONCLUSION

The issues raised are important, and it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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NOVEMBER 1972.

APPENDIX A

No. 71-1999

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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| UNITED STATES OF AMERICA, *Appellant,* v. JOHN P. CALANDRA, *Appellee.* | Appeal from the United States District Court for the Northern District of Ohio, Eastern Division. |

Decided and Filed July 27, 1972.

Before: PECK, MILLER and KENT, Circuit Judges.

MILLER, Circuit Judge. The United States has appealed from a decision of the United States District Court for the Northern District of Ohio in a proceeding ancillary to a grand jury investigation suppressing certain evidence seized from the place of business of a witness, the appellee Calandra, subpoenaed to testify before the grand jury, ordering the return of that evidence, and specifying that the witness need not answer any questions before the grand jury based on the suppressed evidence. While the validity of the search and seizure is presented, the principal issue is whether a district court may consider in a proceeding ancillary to a grand jury investigation a motion to suppress on Fourth Amendment grounds on behalf of a witness for whom the Government has requested immunity pursuant to 18 U.S.C. § 2514.

During the fall and winter of 1970-71 federal agents conducted a rather extensive investigation of certain alleged

bookmaking operations. Joseph Lanese was thought to be the central figure in these illegal activities. On December 15, 1970, a number of search warrants were issued based on the information set forth in a master affidavit which purported to reflect the illicit gambling operation. The information contained in the affidavit was the fruit of court-ordered wiretapping, physical surveillance of suspected participants in the alleged operation, and the statements of six informants. Among others, searches of the person, residence, and place of business of the appellee were authorized. In this case, we are concerned only with the search of Calandra's place of business, the Royal Machine and Tool Company.[1] The warrant specifically authorized the seizure of bookmaking records and gambling paraphernalia.

The business occupies a two-story building. The ground floor occupies approximately 13,000 square feet and houses industrial machinery and inventory. The offices of the company are found on the second floor. A general office area occupying approximately 1500 square feet contains the desks of four employees, drawing tables, and filing cabinets for current records. To the south and separated by a partition, is the office of Calandra, president of the company, and his secretary. The office contains desks, filing cabinets and a safe. North of the general office area is a room in

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[1] The only information in the master affidavit pertaining directly or indirectly to the premises of the Royal Machine and Tool Company was: (1) the observation that Lanese's automobile had been parked outside the building on one occasion, (2) the observation that an automobile registered in the company's names had been parked in front of Lanese's residence, and (3) the statement:

> "Informant 1 advised on December 4, 1970, that JOHN CALANDRA, as of that date, would accept bets and lay off bets, on sports event. [sic]. CALANDRA is a close associate of ANTHONY DELSANTER. CALANDRA uses his home and office on East 163rd Street for his bookmaking operation." (A. 24a).

Informant 1 was characterized in this fashion:

> ". . . [he] has personal knowledge of the bookmaking activity of Joseph Lanese in that for over an extensive period of time he has made himself or personally known of others who have made wagers with or received line information from Joseph Lanese."

which older files and business documents are stored. On December 15, 1970, these premises were subjected to an extensive and apparently careful four-hour search. The record reveals that Government agents spent more than three hours searching appellee's office, meticulously examining virtually every document found therein.

No gambling paraphernalia was discovered during this exploration.[2] However, one of the searching agents found and seized what he believed to be "loansharking" records. While examining promissory notes found in a metal box stored in a filing cabinet, this agent noticed the names of Dr. Walter Loveland on a card. The card indicated that Loveland had been making periodic payments to Calandra. The agent stated in an affidavit that his suspicions were aroused by this card because he was aware that the United States Attorney's office in Cleveland was also investigating violations of 18 U.S.C. Sections 892, 893 and 944, which proscribe certain credit transactions, and that Dr. Loveland had been a victim of the loansharking enterprise which was under investigation. Various items were then seized, including books and records of the company, stock certificates and address books. In his brief, the appellee points out that while the appellant characterizes some of these items as "loansharking" materials, the nature of the materials seized has not yet been determined.

On March 1, 1971, a special grand jury was called to investigate further violations of federal laws proscribing various "loansharking" practices in the Cleveland area. Calandra was summoned to testify on August 17, 1971. He refused to testify, invoking his Fifth Amendment privilege against self-incrimination. The Government requested the district court to grant Calandra immunity pursuant to 18 U.S.C. § 2514 as he was not the target of the investigation. It is acknowledged by the Government that the questions which it intended to put to Calandra were based on the items seized during the December 15, 1970 search. In response, Calandra requested postponement of the hearing

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[2] One football information sheet of general circulation was taken from the desk of an employee.

on the immunity question so that he might prepare his motion to suppress the evidence seized as a result of the search of the Royal Machine and Tool Company and on the ground that he had not received proper notice pertaining to the immunity proceedings. The district court granted the postponement and set the matter for oral hearing on August 27, 1971.

On August 17, 1971, Calandra moved for suppression and return of the evidence in question. The motion challenged the validity of the search on a number of grounds, asserting that the warrant was insufficient in a number of respects and that the search itself went beyond the scope of the warrant. At the August 27 hearing, Calandra stipulated that he would refuse to answer questions based on the seized materials. The district court ordered the items seized from his place of business suppressed, directed their return and specified that Calandra need not answer any questions before the grand jury based on the suppressed evidence. The court based its order on findings that due process ". . . allows a witness to litigate the question of whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure"; that the affidavit was insufficient to establish probable cause to search Royal Machine and Tool Company for gambling paraphernalia; that the evidence seized was not within the immediate "plain view" of the officers; and that the search was invalid because it was a "general search," going beyond the scope of the warrant and the permissible limits of the Fourth Amendment.

We turn first to the propriety of Judge Battisti's consideration of Calandra's Fourth Amendment claims. In the district court, the Government contended that a witness called before the grand jury lacks standing to move for pre-indictment suppression of evidence. It is the Government's view that "[t]he scope of the exclusionary rule, or, what is the same thing, standing to suppress the fruits of an illegal search and seizure, has been limited to one who

is (1) the subject of the illegal search and (2) the person against whom the evidence is sought to be admitted." While it is, in fact, clear that Fourth Amendment claims may not be raised vicariously (*Alderman* v. *United States,* 394 U.S. 165 (1969)), it is currently a matter of serious debate whether one whose Fourth Amendment right to privacy has been violated by an illegal search and seizure and is therefore a proper party aggrieved in the *Alderman* sense may assert such right when called as a witness before the grand jury. See especially *In re Egan,* 450 F.2d 199, et seq. (3rd Cir. 1971) (No. 71-263, *cert. granted,* December 14, 1971); *In re Evans,* 452 F.2d 1239 (D.C. Cir. 1971) (No. 71-256, *cert. pending*); *United States* v. *Gelbard,* 443 F.2d 837 (9th Cir. 1971) (No. 71-110, *cert. granted,* December 14, 1971); *Application of United States,* 427 F.2d 1140 (5th Cir. 1970); and *Carter* v. *United States,* 417 F.2d 384 (9th Cir. 1969) (*cert. denied* 399 U.S. 935 (1970)).

In *Weeks* v. *United States,* 232 U.S. 383 (1914), the Supreme Court first applied the exclusionary rule, although not in the grand jury context, as a means of giving effect to the Fourth Amendment guarantee of privacy. The court emphasized the duty of the federal judiciary not to sanction official disregard of the prohibition of unreasonable searches and seizures. That not only the particular items seized illegally but also the "fruit" of a Fourth Amendment violation are to be made unavailable to law enforcement officials was determined in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920). The very broad language of *Silverthorne* is tempered by the fact that traditional principles of standing govern the matter of who may seek suppression of the "fruit" of an illegal search and seizure. In *Alderman* v. *United States, supra,* the Supreme Court held that ". . . suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself . . . ." This rule that Fourth Amendment rights may not be asserted vicariously is consistent with the general rule of standing relied upon by the court below which was enunciated in *Association of Data Processing Service*

*Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970). The Court there held that the standard for determining whether a person possesses requisite standing ". . . concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected by the statute or constitutional guarantee in question." 397 U.S. at 153.

The motion to suppress considered by Judge Battisti was filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure which provides that "[a] person aggrieved by an unlawful search and seizure" may move for the "return" and "suppression" of the evidence illegally seized. Rule 41(e) is "the statutory direction governing the suppression of evidence acquired in violation of the conditions validating a search." *Jones* v. *United States*, 362 U.S. 257, 260 (1960). The Advisory Committee's notes report that with one exception not here relevant, Rule 41(e) "is a restatement of existing law and practice." *In re Fried*, 161 F.2d 453, 458 (2nd Cir. 1947); 3 Wright, Federal Practice and Procedure, Section 673, p. 105. The Supreme Court made plain in both *Alderman* v. *United States, supra*, and *Jones* v. *United States, supra*, that the requirement of standing to assert the exclusionary rule articulated in *Weeks, supra*, and applied to the states in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), is given expression in the "person aggrieved" language of Rule 41(e).

It has been widely held that a motion to suppress by a target defendant is proper even where no prosecution is pending. *In re Fried, supra;* and *see Centracchio* v. *Garrity*, 198 F.2d 382 (1st Cir. 1952).

It was the view of the Court in *Centracchio, supra*, that it should "respect the clear line of authority in the search and seizure cases," in light of the Advisory Committee's statement that Rule 41(e) was intended to be "merely a restatement of existing law and practice." After quoting the rule, the Court observed that "[t]his rule does not specify the time when such a motion may be made, and presumably is broad enough to sanction the filing of such

a motion in the district court prior to indictment." It is true that the Court did not grant the motion to suppress, pointing out that "[j]udicial interference of this sort . . . must . . . be regarded as the exception rather than the rule." However, the Court's ruling was not based on a rejection of its analysis of the appropriateness of a pre-indictment motion under Rule 41(e) but rather on the ground that it was "clear that the evidence in question did not come into the possession of the government officials in violation of petitioner's rights under the Fourth Amendment." It is significant to note that while generally disapproving preindictment motions to suppress, the Court pointed out one substantial reason why Rule 41(e) motions have been found appropriate exceptions to that policy. The Court stated:

> But in the unlawful search and seizure cases *there has already*, by hypothesis, *been a seizure of property or effects* from the possession of the petitioner *in violation of his constitutional right*.

The source of a district court's jurisdiction to entertain a motion to suppress prior to indictment lies in the inherent "disciplinary powers of the court." *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 355 (1930). See discussion in *Smith* v. *Katzenbach*, 351 F.2d 810 (D.C. Cir. 1965). Viewed in this light the argument that recourse to Rule 41(e) is limited to "parties" or "defendants" cannot be supported. A preindictment motion necessarily involves one who is not a party. It is for this reason that the preindictment suppression motion has, since before the adoption of Rule 41(e), been grounded in the supervisory power of the district court. That an individual subsequently becomes a defendant while another does not cannot be said to cause the first to have standing under Rule 41(e) and the other not. It is the status of the individual as an "aggrieved person" at the time that he files his motion to suppress that is determinative of his or her recourse to a motion to suppress, and not the intention of the United States Attorney to file an indictment against the individual.

Furthermore, contrary to the Government's assertion, the fact that Calandra would be granted immunity and hence could not be "harmed by the evidence" is irrelevant to any resolution of his standing to seek redress through a motion to suppress. The Government's position is a distortion of the nature of the rule announced in *Weeks* giving effect to the prohibitions of the Fourth Amendment. While evidence is excluded under the Fifth Amendment to prevent the abridgment of one's rights in the criminal process, the Fourth Amendment, in contrast, was not intended *to protect the rights of a defendant once involved in the process.* Rule 41(e) and the exclusionary rule generally are addressed, as the court in *Centracchio* v. *Garrity, supra,* pointed out, to the provision of redress for the constitutional violations that have already occurred.[3] The primary purpose of that redress is deterrence. As the Supreme Court stated in *Elkins* v. *United States,* 364 U.S. 206 (1960):

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guarantee in the only effective, available way—*by removing the incentive to disregard it.* 364 U.S. at 217. (Emphasis added.)

It is the right of the citizen to security from illicit intrusions upon privacy that the exclusionary principle seeks to guarantee. Additionally, the return and suppression of the fruit of an illegal search serves to give partial redress to the one whose right to privacy has been violated. Suppression may be seen as vindication of the right already infringed. That relevant evidence is suppressed is deemed a cost and not a benefit of the exclusionary rule. *Wolf* v. *Colorado,* 338 U.S. 25 (1949); *People* v. *Defore,* 242 N.Y. 13 (1926).[4]

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[3] Judge Learned Hand noted in *United States* v. *Poller,* 43 F.2d 911, 914 (2nd Cir. 1930), that "it is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself . . . ."

[4] The classic statement of this aspect of the exclusionary rule is, of course, Judge Cardozo's in *People* v. *Defore, supra, that under such a rule* "[t]he criminal is to go free because the constable has blundered."

Arguably, a "person aggrieved" who is a "stranger" to criminal proceedings, ought to have enhanced standing to seek redress under Rule 41(e). Ironically enough, a corollary of the Government's position would seem to be that the "criminal" whose windfall gave concern to Judge (later Mr. Justice) Cordozo would have access to the remedy afforded by Rule 41(e) and the exclusionary rule, whereas an equally aggrieved victim of an unconstitutional invasion of privacy who was not likely to become a defendant would not. Such an anomaly is not justified in terms of the purposes of the exclusionary rule. It is well to recall the Court's statement in *Weeks, supra,* that "this protection reaches all alike, *whether accused of crime or not,* and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws." 232 U.S. at 391-2. Thus, it is our view that the prospect of immunity in no way affected the standing of Calandra as one entitled to recourse under Rule 41(e) on the ground that he is a "person aggrieved by an unlawful search and seizure."

The question remains whether the fact that one has been called as a witness before a grand jury curtails his recourse as a "person aggrieved" to a motion to suppress pending the grand jury proceeding. In *Blair* v. *United States,* 250 U.S. 273 (1919), the Supreme Court held that a witness subpoenaed in a grand jury investigation of possible violations of the Corrupt Practices Act of 1910 had no standing to question the power of Congress to enact provisions for regulation and control of primary elections of candidates for the office of United States Senator. The Court made explicit the strict duties of one summoned before a grand jury. The court pointed out that "in the ordinary case [it is] no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not." There is no question as to the vitality of the general principles enunciated in *Blair, supra.* It is true as the Second Circuit states in *United States* v. *Flood,* 394 F.2d 139 (2nd Cir. 1968), that "[i] has traditionally been held that such a witness usually cannot impede collection of evidence by

the grand jury even though the issues he seeks to raise could later be litigated—perhaps with success—by an indicted defendant . . . ." (Citing cases).

Nevertheless, as we noted at the outset, there is serious debate over the matter of whether the general rule against interference with the investigations of a grand jury applies to a motions to suppress brought by a proper "person aggrieved" by a Fourth Amendment violation. As the First Circuit pointed out in *Centracchio, supra,* the Fourth Amendment is a proper exception to the policy against preindictment motion to suppress. The *Blair* court, *supra,* made crystal clear that the general policy which it stated was subject to "exceptions and qualifications," identifying specifically the Fifth Amendment right not to incriminate oneself, pointing as well to "confidential matters . . ." and indicating that there may be other "special reasons a witness may be excused from telling all that he knows." 250 U.S. at 281.

The Supreme Court in *Blair, supra,* did not of course consider the question whether a motion to suppress the fruit of a violation of the Fourth Amendment constitutes such a "special reason." And, since *Blair,* the Supreme Court has not had occasion to consider whether "a witness may be excused from telling all that he knows" because the questions put to him are the fruit of a violation of the Fourth Amendment. However, the concept of standing to move to suppress has received considerable clarification, as we have noted, since announcement of the exclusionary rule in *Weeks* v. *United States, supra.*

It is our view that the interests identified in *Blair, supra,* and other significant factors, do not override the policy considerations which underpin the exclusionary rule and Rule 41(e). Before describing the relevant interests and attempting to set forth our view of the balance that must be struck, we should note some recent cases which seem to provide support for the Government's position that the investigative process of the grand jury should not be disturbed in order to vindicate the interests which the Fourth Amendment and the exclusionary rule seek to protect. See

in this connection, *United States* v. *Flood, supra; Carter* v. *United States, supra; Application of United States, supra;* and *United States* v. *Gelbard, supra.*

It should be pointed out that in none of these cases did the Court deal with the general standing of a "person aggrieved" to vindicate his and society's Fourth Amendment interests.

The respective interests involved are not difficult to identify. The Court in *Blair* made plain the weight which it attached to society's interest in a grand jury as an institution free to ascertain the truth through essentially unfettered inquiry, noting that the grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation . . . ." 250 U.S. at 282. The Court has not departed from this view. Furthermore, it must be noted that while such inquiry may assist the prosecution, it may also be in the best interest of a potential defendant. The Supreme Court in *Costello* v. *United States,* 350 U.S. 359 (1956), further emphasized the uniqueness of grand jury proceedings by rejecting an attack on an indictment which was concededly based entirely upon hearsay evidence.

While the importance of the speedy and efficient administration of criminal justice must not be understated in this period of overloaded dockets, it is not at all clear that the procedure approved by Judge Battisti would unduly burden the functioning of the grand jury. Certainly, it was his view as a district judge that it would not. We concur in that view. This is particularly so in the instant case as the alternative to the procedure used below is the raising of the Fourth Amendment through a contempt proceeding, which would, it would seem, be more disruptive.

Against the interest of unencumbered inquiry and the efficient administration of justice must be weighed the importance which society attaches to the protection of the Fourth Amendment guarantee of privacy which is afforded

by access to the exclusionary rule and Rule 41(e). In *Egan*, Judge Gibbons states:

> The witness' privacy yields to a paramount public interest even though his testimony may subject him to enmity, ridicule, danger or disgrace. That paramount public interest outweighs considerations of witness privacy because the whole life of the community depends upon how well the institutions of justice perform their role of social lubricator.

Such an analysis subordinates the primary interest which the motion to suppress seeks to advance. As the Court in *Elkins* v. *United States, supra,* made clear, the purpose of the suppression of the fruit of an unconstitutional infringement of privacy is to remove the incentive for such illicit activity. It is motivated by the view articulated by Mr. Justice Brandeis in his dissent in *Olmstead* v. *United States,* 277 U.S. 438 (1928):

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become law unto himself; it invites anarchy.

While it is impossible to verify empirically the effectiveness of suppression in discouraging governmental invasion of privacy, it is not difficult to identify circumstances which increase the incentive to violate Fourth Amendment rights. Where such circumstances are present, the suppression device should be limited only in the face of other demonstrably substantial and overriding interests.

The Court below has properly focused upon the serious flaw of the Government's position. Increasingly, our criminal process is concerned not with the isolated individual event but with matters of considerable scope involving numerous persons, some of whom are central to the suspected or alleged crime and some of whom are not. Specifically, this tendency is a result of the increasing concern of law enforcement with "organized crime" and with con-

spiracies, whether connected with commerce or with violence. Under such circumstances, it is both logical and proper that police should concentrate their greatest effort on the key figures rather than "small fry" of suspected criminal activity. For example, it is agreed that the key to dealing adequately with the trade in heroin is not the "pusher on the street." Under such circumstances, the temptation to ignore the rights of individuals not involved or thought crucial, in order to obtain knowledge useful in investigating the larger suspected illicit enterprise, is natural and understandable.

It is, however, precisely this temptation which the Fourth Amendment and the exclusionary rule were devised to restrain. The Fourth Amendment reflects a considered decision that, in our scheme of government, the individual's right to privacy shall not invariably give way to what is deemed most efficiency and expedient in the prosecution of crime. Suppression of the fruit of the violation of that right to privacy, for example, has been considered the most effective means of dealing with the temptation to violate it.

The importance of suppression as a device is directly proportional to the incentive that exists to violate the right. Where, as here, the incentive is greatest, access to the motion to suppress attains maximum importance.

Furthermore, it is important to emphasize that we deal with a fundamental constitutional claim that is ripe. Calandra's right to privacy has been violated.[5] As a direct result he finds himself before the grand jury to be asked questions which are the fruit of the intrusion upon his privacy. Given the immunity device, his claim is not one which will be vindicated in the criminal process. Absent the opportunity to raise the claim at this stage in the pro-

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[5] We do not find it necessary to discuss in detail the questions pertaining to the validity of the search warrant and the search itself. Upon consideration, we are of the view that the district judge was clearly correct in finding that the warrant utterly failed to establish probable cause to search Royal Machine and Tool Company for gambling paraphernalia, and further that the search itself was a general one which far exceeded the scope of the warrant and the permissible limits of the Fourth Amendment.

ceedings Calandra's opportunity for redress is severely limited and at the same time the very substantial incentive for law enforcement officials to combine the illegal search with a grant of immunity at the grand jury stage is unrestrained.

While we do not in any way minimize the importance of the considerations articulated in *Blair* nor the interests of orderly and efficient judicial administration, it is our view that the impact on either by the procedure applied here by Judge Battisti is not great, and that in any event these interests are outweighed by the very substantial interests of citizens to have access to the motion to suppress in circumstances such as these.

The order of the District Court is accordingly
Affirmed.

APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-1999

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UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

vs.

JOHN P. CALANDRA, *Defendant-Appellee.*

Before: PECK, MILLER, and KENT, Circuit Judges.

[Filed, Jul. 27, 1972, James A. Higgins, *Clerk*]

### JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded inasmuch as the appeal is In Forma Pauperis.

Entered by order of the Court.

James A. Higgins
Clerk
Appellate

Issued as Mandate:

COSTS: NONE

A True Copy.

Attest:

James A. Higgins, Clerk

Filing fee .....$....
Printing .....$....
Total .....$....

APPENDIX C

No. 71-1999

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA, *Appellant,* v. JOHN P. CALANDRA, *Appellee.* | ORDER |

Before: PECK, MILLER and KENT, Circuit Judges.

[Filed, Sep. 19, 1972, James A. Higgins, *Clerk*]

In this action the appellant, United States of America, has filed a petition for rehearing with the request that the case should be heard en banc.

It appearing that no judge of the Court has requested an en banc hearing, and the panel being of the opinion that the petition to rehear is without merit;

It is hereby ORDERED that the said petition and request for rehearing en banc be and the same are hereby denied.

ENTERED BY ORDER OF THE COURT.

/s/ James A. Higgins
Clerk

APPENDIX D

**In re Application for Immunity of John P. CALANDRA.**

**No. CR 71-300.**

United States District Court,
N.D. Ohio, E. D.

Oct. 1, 1971.

In a proceeding ancillary to a Grand Jury hearing, a witness whom the government wished to immunize brought a motion to suppress. The District Court, Battisti, Chief Judge, held that due process requires that the witness be allowed to litigate the question of whether evidence which constitutes the basis for questions asked of him before the Grand Jury was obtained in a way which violated constitutional protection against unlawful search and seizure. The Court also held that probable cause had not been shown for the issuance of a search warrant and that the warrant was invalid as countenancing a general search.

Evidence suppressed and its return ordered; order in accordance with opinion.

**1. Constitutional Law Key 257**

Due process requires that witness be allowed to litigate question of whether evidence which constitutes basis for questions to be asked of him before Grand Jury pursuant to grant of immunity was obtained in way which violated constitutional protection against unlawful search and seizure. U.S.C.A. Const. Amend. 4; 18 U.S.C.A. §§ 2514, 2515, 2518(10).

**2. Gaming Key 60**

Where authorized electronic surveillance produced evidence only of telephone calls made from or to witness' home, and no calls to or from his office, and conversation established only betting and furnished no evidence that witness was bookmaker, such evidence failed to establish

probable cause to search witness' business for gambling paraphernalia. U.S.C.A.Const. Amend. 4.

**3. Gaming Key 60**

That automobile of a purported gambler and bookmaker was seen at witness' business establishment and that automobile registered to such business establishment was seen parked in front of residence of such purported gambler and bookmaker and that both such automobiles were seen at club did not furnish probable cause for search of business establishment. U.S.C.A. Const. Amend. 4.

**4. Searches and Seizures Key 3.6(1)**

Search warrant affidavit which did not specify underlying circumstances and did not describe alleged criminal activity of accused in sufficient detail that magistrate might know that informant was relying on something more substantial than casual rumor or accusation was insufficient for issuance of search warrant. U.S.C.A.Const. Amend. 4.

**5. Gaming Key 60**

Search warrant which countenanced general search of two-story building including first floor of about 13,000 square feet and second floor office area of about 1,500 square feet and small office occupied by person who, according to averments of informant, used his home and office for alleged bookmaking operation, was invalid. U.S.C.A.Const. Amend. 4.

**6. Searches and Seizures Key 3.7**

Search warrant for either apartment house or commercial establishment is not sufficient if it merely alleges address and describes building generally; it must state with some specificity where in the building the agents expect to find particular items listed in warrant. U.S.C.A.Const. Amend. 4.

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Robert Gary, Steven R. Olah, Cleveland, Ohio, Organized Crime Strike Force, for Government.

Gerald S. Gold, Robert Rotatori, Cleveland, Ohio, for Calandra.

BATTISTI, Chief Judge.

On August 17, 1971, John Calandra appeared before a Federal Grand Jury. On the same day the United States Attorney requested that John Calandra be granted immunity pursuant to Title 18, Section 2514 of the United States Code. Prior to the granting of the immunity, Calandra filed a "request for postponement of hearing on application for immunity order" in order that he might move to suppress certain evidence which he claims to have been seized in violation of the requirements of the Fourth Amendment. Calandra alleges, and the Government acknowledges, that the questions put to Calandra before the Grand Jury were based upon this evidence. The Government wishes to immunize Calandra and he has stipulated that he will refuse to answer any questions before the Grand Jury. The questions presented in this motion are whether a district court may consider a motion to suppress in a proceeding ancillary to a grand jury hearing and, if so, whether the evidence upon which the questions were based was illegally seized either because the affidavit for the search warrant did not allege probable cause for a search of the Royal Machine and Tool Company, or because the search of the Royal Machine and Tool Company was too broad in that it went beyond the allowable limits prescribed by the search warrant and the strictures of the Fourth Amendment.

I. *The Propriety of the Hearing.*

In a recent case, In the Matter of Egan, 450 F.2d 199 (3d Cir. 1971), the Third Circuit *en banc* examined a similar but not so far reaching set of facts. Sister Joques Egan, an alleged co-conspirator, but not a co-defendant in an indictment returned in the Middle District of Pennsylvania, was called before a federal grand jury and refused to testify because, among other grounds, "the information which caused the Government to subpoena her and which

prompted the questions propounded to her flowed from illegal wire tapping and electronic surveillance." 450 F.2d at 201. She was subsequently held in contempt. The Third Circuit, with which this Court concurs, held the District Court was required to hold a hearing as to the alleged violation of Sister Egan's Fourth Amendment rights because it was required by 18 U.S.C. § 2518(10), 18 U.S.C. § 2515, and the Fourth Amendment itself. In the instant case, Calandra is raising a much broader issue. He seeks to extend the narrow holding of the Third Circuit to the limit of the Fourth Amendment thus necessitating the Court's ruling upon any Fourth Amendment violation which becomes relevant within the context of the Grand Jury's examination.

The Government contends that "it is settled law that motions to suppress are not entertained in the context of a grand jury proceeding." It seems, however, that this is not settled law, that in fact it is the subject of considerable controversy. (Compare In the Matter of Egan, 450 F.2d 199 [3d Cir. 1971] and United States v. Gelbard [United States v. Parnas, 443 F.2d 837 [9th Cir. 1971]. See Greenspan and White, Standing to Object to Search and Seizure, 118 U.Pa.L.Rev. 333 (1970). It is the position of the Government that this motion is premature because it is being considered prior to the grant of immunity rather than in connection with a contempt hearing. This Court cannot agree. It has been stipulated that the Government intends to immunize Calandra and that Calandra intends not to answer its questions even at the risk of a contempt citation. Thus, in substance, the situation is in the same posture as it would be in connection with a contempt hearing. The scope of review is no larger here than it would be after Calandra had gone through the revolving door which would bring him back here raising the same issues in a defense to a contempt citation. The fact that he is not in jail is not significant, because he, like Sister Egan, would be allowed reasonable bail pending this hearing and any appeal.

The thrust of the Government's position is that Calandra

has no standing to raise search and seizure question as a witness before a grand jury. The standard for determining whether an individual possesses the requisite standing, as the Supreme Court stated, "* * * concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Normally when an illegal search and seizure has been directed against a citizen, he has standing to complain of the Fourth Amendment violation. "The fact that the question of standing arises in a grand jury investigation does not alter the result." In the Matter of Egan, 450 F.2d at 210.[1] The Government urges that since the witness will never reach the status of defendant, he is in no jeopardy and therefore he may not raise his Fourth Amendment claim. See Carter v. United States, 417 F.2d 384 (9th Cir. 1969), cert. den. 399 U.S. 935, 90 S.Ct. 2253, 26 L.Ed.2d 807 (1970). See also Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919). This argument is buttressed by the language of In re Shead, 302 F.Supp. 569 at 571 (N.D.Cal.1969).

> "The constitutionally exclusionary rule of illegally-obtained evidence is based on the necessity for an effective deterrent to illegal police action. * * * The risk of not being able to achieve conviction serves this purpose. It is a truism that the deterrent is strengthened by extending the exclusionary rule to grand jury proceedings while they are in progress. *However, this would be an unduly burdensome restriction on the administration of justice.*"

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[1] There was no disagreement on the point in *Egan*. Dissenting Judge Gibbons stated "* * * [I]t is perfectly clear that a witness can create a case or controversy to test the existence of a witness privilege by standing in contempt of an order to testify. * * * Moreover it makes no difference that the witness asserts his privilege in a grand jury proceeding." 450 F.2d at 224.

Since the question of standing seems to be a "non-issue," to quote the words of dissenting Judge Gibbons in *Egan*, 450 F.2d at 224, the issue of the restriction on the administration of justice stands alone at the core of the argument of the United States. The Government relies heavily on the dissenting opinion in *Egan*. Instead of repeating the careful analysis of the Fourth Amendment question in the opinion of the Third Circuit, an examination of that dissenting opinion seems in order.

The dissenting opinion agrees with the prevalent view of the Ninth Circuit, Carter v. United States, *supra*, and the Second Circuit, United States ex rel. Rosado v. Flood, 394 F.2d 139 (2d Cir. 1968) that the protections of the Fourth Amendment do not extend to a witness before the grand jury. Judge Gibbons objects to what he classifies as an unqualified witness privilege, which he contends the majority of the Third Circuit has created in the place of a limited exclusionary rule of evidence which operates on behalf of defendants in criminal proceedings. To prove his point, Judge Gibbons hypothesized an example. Suppose A's telephone is unlawfully tapped and further suppose that through this unlawful electronic surveillance the Government learns that A has information helpful to the defense of B, someone under indictment. If the Government discloses to B that A would be a helpful witness, A may nevertheless refuse to testify. The fact that A will not so refuse is not considered by Judge Gibbons. However, assuming that A does refuse to testify, what has the Government lost that will not be corrected next time when a lawful electronic surveillance is in operation? Consider the alternative. If a witness may not raise the Fourth Amendment claim at this time, what is to force the Government to obtain search warrants or wire tap warrants whenever it wants evidence for a grand jury investigation. Suppose A has evidence in his possession that would incriminate B. A is involved in an illegal operation with B, but B is a much more important figure in the organization supervising this illegal activity. Agents of the Government without a warrant enter A's business an dexamine every cubic foot of it. After this

thorough search in which certain evidence is found. A is then called to testify before the grand jury and is immunized. His only defense to this violation of his privacy is a term in jail for civil contempt. He may, of course, testify and incriminate B and ignore the invasion of his privacy.[2] Certainly if these are the only alternatives, as they seem to be, the sanctity of the Fourth Amendment protections will win out against the efficient administration of the grand jury. Judge Gibbons disagrees.

> "The witness' privacy yields to a paramount public interest even though his testimony may subject him to enmity, ridicule, danger or disgrace. That paramount public interest outweighs considerations of witness privacy because the whole life of the community depends upon how well the institutions of justice perform their role of social lubricator." 450 F.2d at 222.

Judge Gibbons fails to include in his equation the fact that if the Government is allowed to violate a person's privacy only when it has the requisite probable cause, he will have the needs of the grand jury satisfied without being subject to the criticism that the Fourth Amendment is suspended in the context of a grand jury investigation.

Judge Gibbons next characterizes the rights of the witness as third party rights and then states that the litigants and the judicial process, rather than the wrongdoer, are the victims of the delay that results from the adjudication of those rights. Judge Gibbons rests his position, as does the Government, in the case at bar, on the delay that will be caused by the adjudication of third-party rights. The majority opinion in *Egan* attempted to minimize the potential effect on the judicial process as a whole by saying:

> "We assume that the Government will attempt to conduct surveillance within statutory and constitutional limits, and that only in a slight number of cases will there be a

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[2] The Court notes that the defendant can sue the Government for damages or file a motion to return the seized evidence. However, both of these are inadequate. See infra pp. 741, 742.

violation of the rules governing wiretapping." 450 F.2d at 216.

There is no argument that the slight number of cases involving wire tapping is a smaller number than those involving the Fourth Amendment generally; yet, although there is no empirical evidence on either side, it seems that the possibility that some grand jury witnesses may seek hearings is not sufficient to cause a curtailment of Fourth Amendment rights. It would seem that, in the absence of empirical evidence, there would be almost a conclusive presumption in favor of the protections provided by the Constitution.

The question of delay explicit in the opinion of Judge Gibbons is one of some depth. Delay, as used in the context of judicial proceedings, does not mean merely those situations in which a trial of a proceeding ancillary to a trial takes longer than it should as compared to some ideal or textbook model. The term delay means that time during which a case is allowed to lie unresolved when there is no justifiable reason not to dispose of the lawsuit. Delay means avoidable delay. The presence of a simple personal injury case on a court's docket for three years is more likely than not an example of avoidable delay. It is not unusual for an antitrust case to be on the docket for three years or longer before discovery is completed. This is not delay. This is merely a long period of time which must elapse in order for the parties to adequately prepare themselves for the trial of this kind of a complex case. Time properly consumed in the trial of a complex case, or analyses of complex or difficult issues, or in holding a hearing to examine whether one's constitutionally protected rights have been violated is not delay, as that term is used in the context of the courts. The issue implicit in the question of delay is whether the examination of third-party rights as they arise in the context of alleged bad conduct on the part of the Government is by definition dilatory, or avoidable delay. Judge Gibbons and the Government in the case at bar seem to be insisting that it is. The Court can not agree. The judicial system is designed to protect the Bill of Rights, not to cast it aside in

a mad rush toward the goal of judicial efficiency. Any examination of a potential infringement of those rights can, under no circumstances, be considered avoidable delay. The reports cite numerous examples where courts have "delayed" the ultimate resolution of a case so that constitutional objections could be heard at a fair hearing and a reliable determination could be reached. See e. g. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1962). Therefore, the fear raised by Judge Gibbons in *Egan* and by the United States in the instant case that the adjudication of third party constitutional claims will unduly delay the grand jury proceedings in particular and the operation of the criminal process in general must be respectfully rejected.

Calandra does have other remedies. He could move to return the evidence after the conclusion of the grand jury investigation or he could sue the Government for damages. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In *Bivens*, the Supreme Court held that the mere suppression of evidence is not sufficient to correct the violation of one's privacy by agents performing a warrantless search. It held that the Fourth Amendment also authorizes a suit for damages recoverable upon proof of injuries resulting from federal agents' violation of that Amendment. If suppression alone is not sufficient then how could money alone be an adequate remedy? Therefore, neither the motion to return nor a suit for damages can be held to be an adequate protection of one's Fourth Amendment rights. It is just as inadequate to be informed that one will not be prosecuted for governmental misconduct as it is to say that years later the United States may monetarily reimburse one for its violations of his privacy. Money damages do not constitute complete restitution for the infringement of constitutional rights. The remainder of the dissenting opinion deals with Section 2515 of Title 18 of the United States Code and its legislative history, which is not here relevant. The opinion near its conclusion states:

"* * * The courts started with the premise that an exclusionary rule of evidence would deter future unlawful police conduct. That premise had no empirical foundation. * * *"

Judge Gibbons rests much of his opinion on the lack of existing empirical evidence to support the decision of the majority of his court in *Egan* and constitutional decisions generally. If courts were required to rely on empiricism alone in such matters, mathematicians and philosophers rather than lawyers and judges would be involved in the trial of lawsuits. The words of Mr. Justice Day in Weeks v. United States, 232 U.S. 383, 391–393, 34 S.Ct. 341, 58 L.Ed 652 (1914) cited by the majority seems more to the point:

> "The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law."
>
> * * * * *
>
> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and so far as those thus placed are concerned, might well be stricken from the Constitution. * * *" 450 F.2d at 217.

As Justice Brandeis stated in dissent In Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (1928):

> "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it

> invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

[1] This Court holds that there is a requirement of due process which allows a witness to litigate the question of whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the constitutional protection against unlawful search and seizure. See In re Evans. (D.C.Cir.1971).

II. *Probable Cause for the Search Warrant.*

The affidavit in support of the application for the search warrant for Royal Machine and Tool Company [3] contained information derived from three separate sources: (1) court authorized electronic surveillance, (2) physical surveillance conducted by members of the Federal Bureau of Investigation, and (3) information supplied to the Federal Bureau of Investigation by confidential informants.

[2] During the course of the lawful electronic surveillance, John Calandra was identified by name and telephone number during numerous conversations with one Joseph Lanese, a purported gambler and bookmaker. Many of these phone conversations were gambling related, but none involved the use of the phone at Royal Machine and Tool. Rather, they were made from or to Calandra's home phone. Calandra admits to these conversations, but claims that he was merely a bettor and not part of any gambling operation. The only evidence which the Government offered in support of its conclusion that Calandra was involved in a gambling operation was that on November 15, 1970, in the height of

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[3] The Government had obtained three warrants, one for Calandra's home, one for a car, and one for his business. The evidence presented in support of all three warrants was the same. We are concerned here only with the search of the Royal Machine and Tool Company.

the football season, Lanese and Calandra had a conversation during which they discussed their bets on seven games. Later that same day, during another conversation made from and to phones not in any way related to Royal Machine and Tool, Lanese told Calandra to "add Detroit," and that the point spread was eight. Even assuming that these calls were made from and to Royal Machine and Tool, it would be difficult to find probable cause based on these phone calls. See generally, Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). However, they were not. The phone calls were made to and from Calandra's home. The affiant's own conclusion about these telephone calls was that they "disclosed a betting relationship between Lanese and Calandra," but even the affiant could not conclude that Calandra was a bookmaker. The Supreme Court has recently held in Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971) that 18 U.S.C. § 1952 does not make it a federal crime to cross a state line for the purpose of placing a bet. There seems to be no difference between patronizing a betting establishment by appearing in person and using the telephone. Compare *Rewis, supra,* and United States v. Chambers, 382 F.2d 910 (6th Cir. 1967). From the evidence he presented in the affidavit as it relates to the phone conversation between Lanese and Calandra, it appears that the affiant observed mere betting. However, since none of these calls in any way involved the phone at Royal Machine and Tool, this evidence has no probative value in establishing probable cause to search Calandra's business at Royal Machine and Tool for gambling paraphernalia.

[3] In addition to the conversations overheard, physical surveillance by members of the F.B.I. placed Lanese at the Royal Machine and Tool Company, and an automobile registered to Royal Machine and Tool was seen at Joseph Lanese's residence.

On November 13, 1970, Lanese's 1969 automobile was surveilled to the Royal Machine and Tool Company. This allegation alone cannot support a claim of probable cause to believe that Royal Machine and Tool was a front for a gambling operation. In the words of Spinelli v. United

States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), this visit reflects nothing more than "innocent seeming activity and data. • • • [which] could hardly be taken as bespeaking gambling activity." 393 U.S. at 414, 89 S.Ct. at 588. Spinelli's automobile was observed parked in the apartment house lot four out of five days of his surveillance. This was found by the Supreme Court to be insufficient cause for the issuance of the warrant. If four observations were insufficient, one visit must certainly be insufficient. In addition, the warrant did not allege the purpose of the visit nor did it allege that Lanese saw or spoke with anyone. Other than the fact that Lanese's car was observed in front of Royal Machine and Tool, there is no reference to any communication or connection between Lanese and Royal Machine and Tool. This is not sufficient for probable cause.

On November 16, 1970, according to the affidavit, a Pontiac registered to Royal Machine and Tool was observed parked in front of the residence of Joseph Lanese. Shortly after this "observation" Lanese telephoned the Fai-Com Club and advised the other party to the conversation that he, Lanese, and "Johnny" were coming to the club. The F.B.I. then observed both the Pontiac and Lanese's automobile in the vicinity of the Fai-Com Club. The affidavit does not allege that Calandra was operating the Pontiac. The mere fact that the Pontiac was registered to the Royal Machine and Tool Company does not mean that the company authorized its use or that the car was being used for any illegal purpose. To extend Lanese's "taint of evil" to the Pontiac and then to Royal Machine and Tool is stretching it much too far. The affidavit does not specify anything which would indicate that any illegal activity went on between the driver of the Pontiac and Lanese, and he specifies nothing that would in any way indicate that any illegal activity was being engaged in at Royal Machine and Tool. The affidavit reveals neither the identity nor the description of the driver, does not state whether he was in any way related to Royal Machine and Tool, that the driver was observed entering or leaving Lanese's residence, that the driver was observed en route to the Fai-Com Club, nor that

the driver was seen entering the Fai-Com Club. This is not sufficient to establish the existence of probable cause for the existence of a warrant to search Royal Machine and Tool.

[4] The affiant declares that on December 4, 1970, an informant advised him that as of that date Calandra would accept and lay off wagers and that defendant used his home and his office for an alleged bookmaking operation. This informant is said to be reliable, and as having made wagers and of personally knowing others who have made wagers with Lanese. *Spinelli, supra,* and Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) require that an application for a search warrant set forth the underlying circumstances from which the informant drew his conclusions so as to enable the magistrate independently to judge the informant's conclusion that the accused was indeed running a bookmaking operation. No such "underlying circumstances" are here present. The affidavit in fact does not allege that the informant, the affiant or anyone known to him personally has ever placed a bet with Calandra, or observed him taking a bet, or in fact that he ever visited Calandra's home or office. An alternative is offered in *Spinelli* to the requirement of "underlying circumstances":

> "In the absence of a statement detailing the manner in which the information was gathered it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld, or an accusation based merely on an individual's general reputation." 393 U.S. at 417, 89 S.Ct. at 589.

In *Spinelli* the informant asserted that the accused used two particular telephone numbers for bookmaking. The Supreme Court found this to be insufficient. There is less presented here.

There is no attempt made in this opinion to retreat from the proposition that the standard of probable cause is a probability of criminal activity and not a prima facie show-

ing, Beck v. Ohio, 379 U.S. 89, 96, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), or that magistrates should be confined to "niggardly limitations or restrictions on their common sense." United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). However, the record seems to indicate that probable cause did not exist for the issuance of the warrant. See United States v. Price, 149 F.Supp. 707 (D.C. D.C.1957); United States ex rel. DeNegris v. Menser, 247 F.Supp. 826 (D.C.1965). No fact taken independently nor their sum total establish that the United States had probable cause to search Royal Machine and Tool for gambling paraphernalia.

III. *The Extent of the Search.*

Assuming, arguendo, that the search warrant was validly issued, there is a question raised as to whether the search of Royal Machine and Tool went beyond the scope of the warrant and beyond the bounds permissible under the Fourth Amendment.

The warrant in question authorized agents to seize "* * * bookmaking records and wagering paraphernalia consisting of but not limited to betting slips, cash, bet notices and books of records which are intended for uses in violation of Sections 371, 1084, and 1952 of Title 18, USC." The Fourth Amendment requires that the warrant shall "particularly describe the place to be searched, and the persons or things to be seized." Berger v. New York, 388 U.S. 41, 58, 87 S.Ct. 1873, 1883, 18 L.Ed.2d 1040 (1967). This is to make general searches impossible. Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927). The items seized from Royal Machine and Tool were evidence of an alleged shylocking operation and not of a gambling operation. There are exceptions to the strict *Marron* rule, and the question before the Court is whether the evidence of the alleged shylocking operation fits into one of these exceptions.

It is well established by now that fruits of a crime, instrumentalities of a crime, contraband and mere evidence may be seized in a lawful search. See Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). Evidence may be seized under one of these exceptions only when the

items seized bear a reasonable relationship to the purpose of the search.

> "There must be, of course, a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus, in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." 387 U.S. at 307, 87 S.Ct. at 1650.

As the Sixth Circuit stated in United States v. Eisner, 297 F.2d 595, 597 (6th Cir. 1962) "* * * Where an officer is proceeding lawfully, making a valid search, and comes upon another crime being committed in his presence, he is entitled to seize the fruits thereof. * * * " *Eisner* dealt with the seizure of furs stolen at another time and place, but within the plain view of the officers upon their search of Eisner's automobile. The furs in the car were not listed in the search warrant, but the Sixth Circuit held that nonetheless they could be lawfully seized. See Aron v. United States, 382 F.2d 965 (8th Cir. 1967).

The question of the parameters of the "plain view" doctrine was discussed by the Supreme Court in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The Court reaffirmed its view that the police may seize evidence in plain view without a warrant, so long as they had a valid justification for their original intrusion. The Court stated its view of the limits of such a search:

> "Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." Id. 91 S.Ct. at 2038 (1971).

Stanley v. Georgia, 394 U.S. 557, 569, 89 S.Ct. 1243, 22 L.E.2d 542 (Stewart, J. concurring) provides a concrete ex-

ample of this rule. The search in *Stanley* was directed at bookmaking paraphernalia, but after a thorough search of Stanley's home the agents discovered only some allegedly obscene films which they seized. The criminal nature of this evidence was not plainly apparent. Rather, the officers had to exhibit them by means of a projector found in another room. This the concurring judges found to be an unlawful search and seizure.[4]

The items seized here in the thorough search of the offices and plant of the Royal Machine and Tool were stock certificates and other records and forms. Not until a locked file drawer in the offices of Royal Machine and Tool was opened were the items in "plain view," and only after carefully examining each and every item in this drawer could the agents determine that they may be evidence of a criminal activity. This case is too close to that of *Stanley* for this Court to depart from its teaching.

[5, 6] However, the search warrant countenanced a general search and as such is invalid. Royal Machine and Tool occupies a two-story building. The first floor housing a working area consists of approximately 13,000 square feet. The second floor contains a general office area of about 1,500 square feet and a small office occupied by Calandra and his secretary. In a four-hour search, agents searched literally the entire premise including tool boxes, lunch bags, desks of four employees, numerous filing cabinets, and a complete search of Calandra's inner office. This type of operation is closer to ransacking than a careful search for particularly described items. The affidavit does not state where within the building Calandra kept evidence of the crime of bookmaking, even as to whether it was kept in the working area or in Calandra's office. In United States v. Hinton, 219 F.2d 324 (7th Cir. 1955), the affidavit alleged sale of heroin by certain occupants in an apartment building, but the search warrant authorized a search of the entire building. The Seventh Circuit held the warrant to be void despite the Court's finding that there was probable cause

[4] The majority in *Stanley* decided the case on First Amendment grounds.

to search the apartments of four residents. Mancusi v. DeForte, 392 U.S. 364, 367, 88 S.Ct. 2120, 20 L.Ed.2d 1154 notes that the word "houses" extends to "commercial premises." See e. g. See v. Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1932); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1919). A search warrant for either an apartment house or a commercial establishment is not sufficient if it merely alleges the address and describes the building generally. It must state with some specificity where in the building the agents expect to find the particular items listed in the warrant. See Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1964).

The United States claims that they were aware or had reason to believe that Calandra was operating a shylocking operation. They contend that when they came upon the evidence in question their belief was confirmed. They also admit that on December 11, 1970, they did not possess sufficient evidence to establish probable cause for the issuance of a warrant to search for loan-sharking records at Royal Machine and Tool (18 U.S.C. §§ 892 and 894). This simply will not do. Searches may not be justified after the fact. It seems that the Government was really searching for evidence of a shylocking operation under the guise of a search warrant for bookmaking paraphernalia. Assuming that Calandra is involved in the shylocking business, it is unlikely that evidence of his illegal activity would vanish by the time the United States had obtained sufficient evidence to establish probable cause to search Calandra's office for evidence of a shylocking operation. Then the Government could accomplish its desired result without attempting to stretch the plain view doctrine out of shape.

As the Government notes in its brief, there are no set or absolute standards or guidelines for a reasonable search; and each search must be resolved under the circumstances involved. The constitutional concept of reasonableness or unreasonableness must be imposed on the facts existing in each case. Based on the circumstances here presented, this

search is deemed to be beyond the scope of the search warrant and the warrant is held to be not based upon probable cause. The evidence seized is suppressed. Calandra need not answer any questions before the Grand Jury that are based on this evidence. The evidence seized is to be returned to Calandra forthwith.

It is so ordered.

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